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No. 85-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985
National Freight, Inc., RJG Cab Co., Inc., & Geraldine H. Sweeney
Intervenors-Petitioner,
vs.
Exxon Corporation,
Defendant-Respondent,
and
United States of America,
Plaintiff-Respondent.

NATIONAL FREIGHT, INC.,
RJG CAB INC., and
GERALDINE H. SWEENEY,
Intervenor-Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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DATED: September 13, 1985

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QUESTIONS PRESENTED

The Temporary Emergency Court of Appeals affirmed a district court decision (i) determining that Exxon Corporation had overcharged $1.6 billion by miscertifying crude oil in violation of regulations promulgated pursuant to the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796, as amended by the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, 748, and as incorporated in the Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627, 633.

Without affording an opportunity to those claiming injury by virtue of the overcharges, the District Court determined to distribute the ordered refund to the States of the United States for five federal programs, the principal, and practically exclusive beneficiaries of which are poor persons. In doing so, the District Court "used as guidance certain principles adopted by Congress in the Warner Amendment, §155, Pub. L. 97-377, 96 Stat. 1830, 1919 (1982) directing the disbursement of unclaimed petroleum violation escrow funds," TECA noted in affirming on the basis that such determination by the District Court was within the proper exercise of its discretion.

Petitioners are a trucking company (National Freight, Inc.), a taxicab company (RJG Cab Inc.), and an individual motorist (Geraldine H. Sweeney). They seek to represent the surface transportation end users of approximately 45% of the oil products consumed in the United States. They seek certiorari solely on the issue of remedy. The questions presented are:

1. Whether the end users of more than 45% of the oil products consumed in the United States were unconstitutionally denied their property for public use without compensation, where:

(a) the Court held that the crude oil overcharges had been passed through to them, and

(b) the restitution funds were ordered disbursed to the States for five federal programs, principally and practically exclusively benefitting the poor.

2. Whether a court charged with the statutory duty to make restitution of crude oil overcharge funds to those injured may properly and constitutionally defer to a Congressional determination which is motivated by, and accomplishes, an expressed intent to assist the poor in payment of natural gas heating bills.

3. Whether end users of oil products were denied the procedural due process right to claim against a fund collected under a statute which mandated restitution, where:

(a) the Court held that they had a property right in the funds and were entitled to intervene as a matter of right, and

(b) the Court denied their right to participate as intervenors, first by denying them participation until after it had selected a remedy which would deny them the right to make claims, and thereafter, by limiting their intervention right to the right to appeal.

PARTIES TO THE PROCEEDINGS

The following is a list of the parties to the proceedings below in the Temporary Emergency Court of Appeals in the United States as required by Supreme Court Rule 21.1(b):

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

STATES OF ALABAMA, ARKANSAS, CALIFORNIA, et al.,
Intervenor-Appellees,

EXXON CORPORATION,
Defendant-Appellant; (TECA DC-93)

NATIONAL OIL JOBBERS COUNCIL and the JOBBERS GROUP,
Intervenor-Appellants; (TECA DC-91)

GLADIEUX REFINERY, INC. and U.S. OIL AND REFINING COMPANY,
Intervenor-Appellants; (TECA DC-92)

INDICATED REFINERS,
Champlin Petroleum Company, Ashland Oil, Inc., Tenneco Oil Company, American Independent Refiners Association, Pennzoil Company, and Texas City Refining, Inc.,
Intervenor-Appellants; (TECA DC-94)

GASOLINE RETAILERS,
Luther Griffin, t/a Palmer Highway Exxon, Edward McGovern, t/a Maple Avenue Exxon, Anthony Monaco, t/a Milltown Exxon Servicenter, Inc., Donald E. Skilling, t/a Edon Service Corp., Tex Shipley, t/a Shipley's Standard Service,
Intervenor-Appellants; (TECA DC-95)

TOSCO CORPORATION,
Intervenor-Appellant; (TECA DC-96)

PHILADELPHIA ELECTRIC COMPANY,
Intervenor-Appellant; (TECA DC-97)

AIR TRANSPORT ASSOCIATION OF AMERICA,
Intervenor-Appellant; (TECA DC-98)

GERALDINE H. SWEENEY, RJG CAB INC., and NATIONAL FREIGHT, INC.,
Intervenor-Appellants; (TECA DC-99)

MARATHON PETROLEUM COMPANY, MOBIL OIL CORPORATION, and MURPHY OIL CORPORATION,
Intervenor-Appellants. (TECA DC-100)

There are no parent companies, subsidiaries other than wholly owned subsidiaries, or affiliates of either RJG Cab Inc. or National Freight, Inc.

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No. 85-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

UNITED STATES OF AMERICA,
Plaintiff

v.

EXXON CORPORATION,
Defendant

NATIONAL FREIGHT, INC.,
RJG CAB INC., and
GERALDINE H. SWEENEY,
Intervenor-Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

National Freight, Inc., RJG Cab Inc., and Geraldine H. Sweeney hereby petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States, certiorari to be limited to the issue of the remedy determination.

OPINIONS BELOW

The Opinion of the Temporary Emergency Court of Appeals of the United States (TECA) is as yet unreported, although it does appear at 4 DOE (CCH) §26,539; it is set forth in full in the Appendix submitted in connection with the Petition for Writ of Certiorari of the National Oil Jobbers' Council, et al. filed in the instant proceeding (referred to as the "NOJC Appendix"), Appendix A at page A-1. The Opinion and Order of the United States District Court for the District of Columbia is reported at 561 F. Supp. 816; it appears in the NOJC Appendix C beginning at page A-191.

JURISDICTION

TECA's judgment was entered on July 1, 1985. A timely Petition for Rehearing was denied on August 15, 1985. This Court's jurisdiction is invoked under Section 211(g) of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796 as amended by the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, 748 (previously codified at 12 U.S.C. §1904 Note (1976)), as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 633.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article III, Section 2:

> "The Judicial Power shall extend to all Cases, in Law, and Equity, arising under this Constitution, the Laws of the United States, . . ."

United States Constitution, Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private

> property be taken for public use, without just compensation."

Section 209, the Economic Stabilization Act of 1970 as amended (previously codified at 12 U.S.C. §1904 Note (1976)):

> "Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, *the court may also order restitution of moneys received in violation of any such order or regulation.*" (emphasis supplied)

STATEMENT OF THE CASE

This is an action under Section 209 of the Economic Stabilization Act, *supra*, brought by the Department of Energy ("DOE") against Exxon Corporation ("Exxon") for violation of crude oil pricing regulations promulgated first pursuant to the Economic Stabilization Act, *supra*, and continued under the authority of the Emergency Petroleum Allocation Act of 1973 as amended, *supra*.

On cross motions for summary judgment, the Court held Exxon liable for $895,501,163.85 in overcharges plus interest, and entered a judgment for $1,635,604,638.10 representing interest through June 7,

1983. With additional interest for more than two years since, the amount is in excess of $2 billion.

As to the issue of remedy, the DOE Complaint sought refund to the United States Treasury. On three occasions during the proceeding, various parties sought to raise the issue of remedy, *i.e.*, the disposition of any amount ordered to be refunded — first Exxon by Petition to Interplead the purchasers of the crude oil in February 1981, then various independent refiners by Motion to Intervene on November 24, 1982, and finally, independent gasoline retailers on January 20, 1983. On each occasion, the Court entered Orders staying consideration of remedy until after determination of liability. (NOJC Appendix, D-1, D-2, D-3 at A-286 et seq.)

Without any notice that it was considering remedy, the Court rendered a decision which found that Exxon had indeed overcharged for crude oil, denied the pending motions for intervention, and ordered that the refund be disbursed to the State governments for use in five federal programs which had been previously solely funded by Congressional appropriation. In doing so, it adopted a distribution plan which Congress had used as to $200 million in settlement funds which had been received by the Department of Energy in connection with alleged overcharges in crude oil and refined product sales. Section 155, Further Continuing Appropriations Act, 1983, Pub. L. 97-377, 96 Stat. 1830, 1919 (1982), commonly known as the "Warner Amendment". (NOJC Appendix F-3, at A-314.)

The District Court had no evidence before it as to the impact of overcharges on refiners or resellers through whom the overcharged product passed en route to consumers, nor any evidence as to the impact on various groups or classes of consumers, e.g., motorists and commercial truckers.

The District Court determined, without evidence, (i) that the effect of the regulatory program has been to pass through all overcharges to ultimate end users, but (ii)

that it was impossible to trace the overcharges to particular end users.

The relevant facts with regard to the Court's determination are:

> 1. *As to its determination that the regulatory program passed all overcharges through to consumers:*
>
> (a) The first purchaser from an overcharging producer did essentially share the overcharges with all refiners in the United States. Such was the effect of the Entitlements Program, a part of the regulatory system which essentially equalized the cost of crude oil to all refiners, thus passing through to all refiners any overcharge to any of them.[1]
>
> (b) Neither the refiners who converted crude oil into product, nor the resellers through whom the oil products thereafter passed, necessarily recovered, by virtue of the regulatory framework, their costs. The regulatory system, by creating maximum lawful selling prices, provided the legal opportunity to pass all costs through, but no assurance that all costs would be recovered.[2]
>
> (c) In a subsequent proceeding to *Exxon*, a district court facing a similar situation of crude

1. The Entitlements Program was established by a predecessor agency to the DOE, 10 C.F.R. 211.67 (1974), and continued until decontrol on January 28, 1981, by regulation 10 C.F.R. §211.67 as amended from time to time. A good brief description of the program is set forth by Judge Estes of the Temporary Emergency Court of Appeals in *Pasco Inc. v. Federal Energy Administration*, 525 F.2d 1391, 1394-1395 (TECA 1975), the relevant excerpt from which is set forth in Judge Becker's dissent here, NOJC Appendix, at A-161-162.

2. 10 C.F.R. §S212.83, 212.93 (1981 and prior).

oil overcharges involving, with interest, approximately $1 billion, rejected the abandonment of an effort to determine economic injury, *In re the Department of Energy Stripper Well Exemption Litigation*, 578 F. Supp. 586, 595-596 (D. Kan. 1983), and referred the matter to the Office of Hearings and Appeals of the Department of Energy (OHA) for its factual determination as to injury and its recommendation to the Court as to restitution. In that proceeding, in a Report to the referring Court which was filed with TECA immediately prior to the issuance of its decision here, OHA found, based upon expert economic testimony, that refiners had absorbed between 2.7% and 8.1% of crude oil overcharges, passing on the balance to their direct purchasers (such as large truckers) and to resellers, who in turn supplied gasoline to ordinary motorists and smaller commercial users. The OHA, in its Report, also endorsed a methodology which would (i) permit the same determination of absorption to be made as to resellers and, therefore, by deduction, to consumers, and (ii) permit the distribution of overcharges at a given level of distribution, e.g., refiners, among the individual firms.[3]

2. *As to the determination that no precise tracing of overcharges could be accomplished:*

(a) The OHA Report in the *Stripper Well Litigation, supra*, although agreeing in general that tracing with precision is impossible, determined that injury could be established by economic analysis at the distribution level (*e.g.*, to

3. Report to the United States District Court for the District of Kansas *In re Department of Energy Stripper Well Exemption Litigation*, MDL 378, by the Office of Hearings and Appeals of the Department of Energy. NOJC Appendix G, at A-318.

refiners, and direct purchasers from refiners), and employed in so doing a methodology permitting distribution among the firms or individuals within each distribution level.[4]

(b) The acceptance of a standard of precision as the requirement for restitution was inconsistent not only with the repeated decisions of this Court and Courts of Appeals (*See*, page 25, *infra*), but with decisions of the OHA in its distribution, already completed, of at least $70 million in funds collected from overcharges in oil products.[5]

3. *As to the Congressional precedent in distributing $200 million to the States for the five federal energy programs:*

(a) The expressed Congressional intention in appropriating $200 million of overcharge settlements collected to the States was to assist the poor in the payment of natural gas bills, in view of the Congressional inability to enact legislation controlling rapidly accelerating natural gas bills in late 1982.[6]

The particular federal program which assisted the poor in payment of natural gas bills

4. Although the OHA found "no party in this proceeding has suggested" a methodology which would enable a refiner-by-refiner distribution (OHA Report, NOJC Appendix G, at A-379), the witness presented by utility and surface transportation end users, Dr. Peter Linneman, upon whom the OHA Report relied (NOJC Appendix G at A-369, 381) did present such a methodology; indeed, it was the same methodology for individual refiner distribution which OHA accepted as to refiner class impact.

5. General Accounting Office Report B-214953, February 14, 1985.

6. The announced purpose of the Warner Amendment is found in the Congressional debate, 128 Congressional Record, S. 15115-15119, 15125-15127, December 16, 1982.

was that of The Low Income Home Energy Assistance Act of 1981, Pub. L. 97-35, 95 Stat. 893, *as amended*, 42 U.S.C. §8621, *et seq*. Another of the five federal programs authorized for use in the expenditure of Warner Amendment funds similarly assisted poor people in home energy costs by providing materials for the weatherization of their homes. Pub. L. 94-385, Title IV, Section 411, 80 Stat. 1151, 42 U.S.C. §6861 *et seq*.

(b) The two programs benefitting the poor which were the intended dominant beneficiaries of the Warner Amendment were also the dominant programs in terms of Congressional appropriations, accounting for 95% of the federal appropriations for all five federal programs.[7]

(c) In enacting the Warner Amendment, Congress was aware of the fact, and was indeed concerned, that natural gas costs were not affected by crude oil or oil product overcharges which it was appropriating, since the source of natural gas is not crude oil.[8]

(d) In enacting the Warner Amendment, Congress viewed the $200 million appropriation as the correct amount to supplement the regular federal appropriations of almost $2 billion for low

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7. The computation of the portion of total federal appropriations devoted to the poor relies upon Public Law 97-377, 96 Stat. 1891; Pub. L. 97-394, 96 Stat. 1966, 1986, Conference Committee Report 97-978 and House Committee Report 97-942, 97th Congress, Second Session. In the projected Fiscal 1986 Budget, in which only one of the three non-poor persons programs remains funded, 92% of the projected appropriations are for low income home energy assistance, and presumably the major portion of the balance is for weatherization of poor persons homes. See footnote 10.

8. 128 Cong. Rec., S15117-15118, S15126, December 16, 1982.

income home energy assistance, and indeed expressed its intention that such diversion of energy overcharge funds to the poor was to be a one-time only phenomenon.[9]

(e) Indeed, Congress now is being urged by the Executive to utilize overcharge recovery funds, such as those in Exxon, to fund The Low Income Home Energy Assistance Program and the other federal programs, in place of general Treasury funds for such purposes.[10]

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9. 128 Congressional Record H10435, S15116, December 16, 1982.

10. The Presidential budget submission for fiscal year 1986 reflects the use of $191 million of "funds recovered by the Federal Government from petroleum pricing violations" as the sole source of funding "the weatherization and the schools and hospitals programs," and the availability of $809 million from "petroleum overcharges" for use in funding the $2.1 billion to be expended in The Low Income Home Energy Assistance Program, the balance to be provided by Treasury appropriations (Executive Office of the President, Office of Management and Budget: Budget of the United States Government, Fiscal Year 1986, 5-34, 39-40, 117, 128). Senate Concurrent Resolution 32, adopting the Fiscal 1986 budget, enacted by the House and Senate August 1, 1985, 131 Cong. Rec. H7166-67, S10761, shows the $1 billion reflected in the Presidential submission as an offsetting revenue receipt in functional code 950 rather than in functional codes 270 and 600, as submitted by the President. 131 Cong. Rec. H7138 *et seq*. Both the Presidential submission and Senate Concurrent Resolution 32 also reflect the availability of $1 billion in oil overcharge funds in fiscal 1987 and 1988. It is unclear in the Congressional debate whether the Exxon funds are to be considered as an offset against the regular appropriations for The Low Income Home Energy Assistance Program, the weatherization program, and the schools and hospitals program 131 Cong. Rec. S5911-12 (May 9, 1985); H3519 (May 22, 1985); H3649 (May 23, 1985); the matter remains one for determination in the appropriations process. The position of the Executive would appear clearly to be that the Exxon funds are to be considered available to offset the normal appropriations for these programs. *See*, Footnote 18 and Appendix H and I.

After rendering its decision, before entering final judgment, the District Court reconsidered its prior denial of intervention and, both before and after final judgment, granted motions of various parties to intervene, specifically finding "that the applicants for intervention are entitled to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2)." (NOJC Appendix D-6 at A-294.) The Court limited intervention solely to appeal of its remedy determination, taking no evidence on remedy, and finally entering judgment June 7, 1983.

On appeal, the Temporary Emergency Court of Appeals affirmed in an opinion by Judge Brown, with Judge Becker dissenting on the issue of remedy.

Applications for rehearing, with a suggestion it be *en banc*, were made by various parties, including the Petitioners, and were denied by Order dated August 15, 1985, (NOJC Appendix, at B-1, A-187).

Petitioners are three motor vehicle surface transportation users of oil products, a large trucking company using diesel fuel (National Freight, Inc.), a taxicab company (RJG Cab Inc.), and an individual motorist (Geraldine H. Sweeney) using gasoline. They seek to represent motor vehicle surface transportation end users of oil products, who consumed approximately 45% of the oil products[11] refined in the United States, and, when and if permitted the opportunity, Petitioners will seek class certification.

REASONS FOR GRANTING THE WRIT

Petitioners seek certiorari solely on the issue of remedy, believing, as did Judge Becker in his dissenting Opinion in the Temporary Emergency Court of Appeals, that the District Court was correct in determining the liability.

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11. See Footnote 19.

The decision below disburses $2 billion of crude oil overcharge funds, and will be of precedential significance in the disbursement of an additional $2 to $5 billion in overcharge funds.[12]

Not only does the economic significance of the case merit review but, even more importantly, the decision below stands for three precedential principles, each of which is inconsistent with prior opinions of this Court and of the various Circuits, and each of which threatens significant disruption in the operation of the Judiciary, thus meriting the exercise of this Court's supervisory powers.

Most importantly, the decision below almost inevitably assures a conflict between the Courts and the Congress in the disposition of the crude oil overcharge funds, in this case and in the other overcharge cases pending.

I. The *Exxon* Decision is Having an Unsettling Effect on the Relationship Between the Congress and the Judiciary in the Disbursement of Crude Oil Overcharge Funds: It Threatens a Usurpation of Judicial Authority by the Executive and the Legislature.

The Exxon decision marks the second step in a disruption of the allocation of powers as among the Judiciary, the Executive and the Legislature as to disposition of oil overcharge funds recovered by the Department of Energy. Unless this Court exercises its authority, the

12. Among the larger crude oil cases pending in the Courts are the *Stripper Well Litigation*, *supra*, involving between $1 and $1.5 billion, depending on the disposition of certain motions to vacate dismissal orders as to some of the plaintiffs and *Getty Oil Company v. DOE*, 749 F.2d 734 (TECA 1984), *cert. denied* 105 S. Ct. 1176, involving some $300 million. In OHA, pending Subpart V petitions (pursuant to 10 C.F.R. Part 205, Subpart V) involve between $500 and $700 million in crude oil overcharges. Among other major matters pending in OHA, are proposed remedial orders to Texaco, Inc. involving $2 billion (DRO-0199, OHA) and to Cities Service Company, involving $500 million (HRO-0285, OHA).

usurpation of the Judicial power by the Executive and the Legislature will continue, and indeed accelerate.

First, some background is appropriate. The disposition of overcharge recoveries during the regulatory period was, in most cases, to refund to the first purchaser of the overcharged product, on the assumption that the combination of regulation and free market competition during the refund period would parallel that in the overcharge period, accordingly accomplishing a refund to those overcharged. Such was particularly true as to crude oil overcharges. Since the Entitlements Program equated the cost of crude oil to all domestic refiners, and accordingly affected the entire market, it was assumed that refunds would also be passed through the Entitlements Program and benefit the downstream purchasers in the same way as overcharges had injured them. Deregulation eliminated the efficacy of first purchaser refund as a method of assuring restitution.[13]

In the post-regulatory period (after the January 1981 deregulation), the Office of Hearings and Appeals of the Department of Energy ("OHA"), charged with the responsibility under a regulatory procedure of determining to whom refunds should be made both in connection with settlements and in connection with administrative overcharge determinations,[14] developed a set of economic assumptions as to injury in disbursement of refunds of overcharges in the sale of oil products. In general, the OHA provided resellers and end users the opportunity to claim refunds, and then disbursed the balance to the States for the benefit of end users, insisting

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13. *Grigsby v. Department of Energy*, 561 F. Supp. 50, 54 (W.D. La. 192), *aff'd.* 701 F.2d 147 (TECA 1983), *cert. denied* 103 S. Ct. 1780 (1983); *Sundance Oil Co. v. DOE*, 4 DOE ¶26,345 (D. Col. 1981); *Christmann & Welborn v. DOE*, 4 DOE ¶26,467 (N.D. Tex. 1982).

14. 10 C.F.R. Pat 205, Subpart V, 205.280 *et seq.*

that in each case the States develop a plan which would assure restitution to those who had been injured by the overcharges involved.[15]

In connection with crude oil overcharge refunds, the OHA made no further progress than the first step, permitting first purchasers to make claims, although expressing skepticism over the extent of refiner injury, and deferring determination as to downstream refunds.[16]

In December, 1983, the U.S. Congress made the first wholesale disbursement of crude oil overcharge funds, as well as of product overcharge funds, as to which OHA had not yet undertaken to act, in the Warner Amendment, *supra*. Its appropriation of $200 million of overcharge funds to the States, was made for the express purpose of assisting the poor in the payment of natural gas bills through the Low Income Home Energy Assistance Program, one of the five programs authorized for expenditure by the States in the legislation, and the program clearly intended to be predominantly used by Congress.

The Warner Amendment incursion by Congress on the powers of the Executive, subject to Judicial review, to determine restitution was the first step in the disruption of the relationship between the branches of government in the disposition of oil overcharge funds.[17]

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15. *See, e.g., In the Matter of Standard Oil Company (Indiana)*, 10 DOE ¶85,048, 11 DOE ¶85,185; *Worldwide Energy Corp., et al./Texas*, 12 DOE ¶85,006; *Standard Oil Company (Indiana)/ Virginia, et al.*, 12 DOE ¶85,008; *Belridge Oil Company/Tennessee, et al.*, 11 DOE ¶85,255; *Standard Oil Company (Indiana)/ Oklahoma, et al.*, 13 DOE ¶85,005.

16. *See, e.g., In re Alfred B. Alkek, et al.*, 9 DOE ¶82,521; *In re Adams Resources and Energy, Inc., et al.*, 9 DOE ¶82,553; *In the Matter of A. Johnson and Co., et al.*, 12 DOE ¶85,102.

17. The constitutionality of the Warner Amendment was challenged by these Petitioners in *RJG Cab, Inc., et al. v. Hoedel, et al.*, C.A. 83-3265 (E.D. Pa.). On August 19, 1985, a decision was rendered by Judge Raymond Broderick, dismissing the Complaint on

The second step in the disruption of the separation of powers as among the branches of government is the decision here as to which certiorari is sought. By following the guidance of Congress in the Warner Amendment as to an amount ten times the Warner appropriation amount, the Court not only surrendered its equitable (and statutory) duty to work restitution, but also encouraged the Executive and the Legislature to abrogate to the Legislature the determination of restitution which it had specifically assigned to the Judiciary.

The results are already apparent, and pose the threat of further disruption of the relationship between the branches of government and the inevitable litigation which will follow.

Thus, the Executive is now suggesting in crude oil overcharge cases that the Courts, in cases pending before them, and its own OHA in refund proceedings before it, abjure any refund procedure, and instead defer to Congress for a determination of how to expend the overcharge refunds.[18]

NOTES *(Continued)*

the dual grounds of lack of standing and failure to exhaust administrative remedies, and not reaching the Constitutional challenges, to wit, that the Warner Amendment deprived Petitioners and other end users of procedural due process rights to claim against the funds and of their property for the public use of assisting the poor without compensation, and constituted an unconstitutional interference by the Legislature with the Executive and the Judiciary. The decision will be appealed.

18. Statement of Restitutionary Policy of the Department of Energy and Order Implementing Departmental Policy Regarding Crude Oil Overcharges, 50 Fed. Reg. 27400-03, Appendix H at B-1. Earlier, before the issuance of the OHA Report in the *Stripper Well Litigation*, DOE had successfully urged the District Court in *The United States v. Sutton*, 4 DOE ¶25,501 (N.D. Okla. 1984), *appeal pending*, Nos. 10-57, 10-58 (TECA), to order disbursement of $425 million in crude oil overcharge refunds to the States for three of the Warner Amendment programs, including the Low Income Home Energy Assistance and Weatherization Programs, providing the Court with a draft of legislation it was sponsoring in Congress which

And Congress, at the urging of the Executive, has at least tentatively committed itself to recognizing offsetting revenue to the appropriations for the federal programs authorized for use in Exxon, particularly the Low Income Home Energy Assistance Program, on the assumption that Exxon funds, and/or funds in other cases pending, would be available to the States for such programs. (*See*, Footnote 10).

If the Executive persists, and Congress agrees to apply its policy to the Exxon funds, then the Judicial determination to award the funds to the States for the five programs will be converted, by Congress, into an award to the United States Treasury, since the Exxon funds would be used to avoid what would otherwise be Treasury expenditures for the same programs.

Obviously, any such Congressional enactment will lead to further litigation, raising serious questions as to the assignment of powers as among the branches of government.

Only this Court's grant of certiorari and reversal of the remedy determination by the District Court with instructions to discharge the duty of restitution will prevent the threat to Judicial sovereignty in the disposition of judicially determined crude oil overcharges.

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would utilize oil overcharge refunds to fund those programs, reducing the use of Treasury funds for such purposes. Appendix I, at B-19. In the pending appeal by the defendant in *Sutton*, these Petitioners were granted amicus curiae status by TECA on an application seeking such status for the sole reason of raising the remedy issue which had not been raised by appellant.

II. The District Court's Decision to Abandon a Restitution Effort Mandated by Statute in Favor of Assisting the Poor is Inconsistent With Decisions of this Court and the Circuits, Constitutes a Taking of the Property of Petitioners for Public Use Without Compensation in Violation of the Constitution, and Creates a Dangerous Precedent of Permitting Social Legislation By the Court.

The District Court determined that Exxon's overcharges "were borne by ulitmate consumers of petroleum products throughout the entire country," 561 F. Supp., at 853. Assuming, and the Court did not find otherwise, that the overcharges were spread proportionately to all oil products, motor vehicle surface transportation end users suffered 45% of the injury.[19]

Despite the inevitable inference that surface transportation users of oil products bore approximately 45% of the injury, the Court then determined to award the fund essentially to the poor for use in paying home heating costs, without regard to whether home heating was supplied by an oil product (largely #2 oil), natural gas, or electricity; indeed assuming use of the funds in proportion to the energy source of home heating, 56% of the funds will be made available to poor persons heating with natural gas, a fuel not derived from crude oil, the source of the overcharges.[20]

The District Court acknowledged that it was assisting the poor, noting that the five federal programs it was

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19. In 1978 through 1980, between 44% and 45% of petroleum product supplied was used in motor vehicle fuel consumption, principally in the form of gasoline and diesel fuel. Federal Highway Administration Highway Statistics Annual 1978-80, Department of Energy Monthly Energy Review, August 1982.

20. Indeed, less than 19% of home heating is by products derived from crude oil. Energy Information Administration, DOE: Residential Energy Consumption Survey: Housing Characteristics 1982.

authorizing for funding by the States operated by "reducing overall consumption through conservation or *by direct financial assistance to those most in need.*" 561 F. Supp., at 857 (emphasis supplied).[21] In fact, of course, the dominant use was to be "financial assistance to those most in need," the poor. Such was the intent of Congress in enacting the Warner Amendment which the Court acknowleged was its guideline; since 95% of the federal appropriations for the five programs was for the poor persons programs, it is inevitable that the poor persons program expenditures would represent the overwhelming use of the Exxon funds (*See*, Statement of the Case, at 8).

Such a diversion from surface transportation end users, and indeed from the broad range of home heating oil users of fuel and the general population which bore the cost of goods and services inflated by overcharges in the costs of oil products, violates three important principles:

> (a) the principle that "restitution", here doubly mandated, (i) by the applicable principles of equity, *Porter v. Warner Holding Company*, 328 U.S. 395 (1946); *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960); *United States v. Morgan*, 307 U.S. 183 (1939), and (ii) by statute, Section 209 of the Economic Stabilization Act, "plainly cannot be discharged by payment of the fund to those who show no loss . . . ." *Federal Power Commission v. Interstate Natural Gas Co., et al.*, 336 U.S. 577, 582 (1949). As Justice Frankfurter explained in his concurring opinion in *Interstate*:
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> > ". . . it is now the duty of the Court to make that retrospective determination not by unfounded assumptions erected into rigid rules, but by

21. The Temporary Emergency Court of Appeals was somewhat less forthright, describing the authorized programs as "designed to benefit all citizens." (NOSC Appendix A at A-85)

> ascertainment of what actually would have happened contemporaneously had purchasers from Interstate obtained their gas at the lower rate."

336 U.S., at 586.

As this Court explained in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1975), quoting Congress, the object of the exercise of equitable powers of restitution is to make the victims whole "so far as possible, and restored to a position where they would have been were it not for" the unlawful violations.

So indeed held the Temporary Emergency Court of Appeals itself in the landmark case of *Citronelle-Mobile Gathering Inc. v. Edwards*, 669 F.2d 717, 722-723 (TECA 1982), *cert. denied*, 459 U.S. 877 (1982), where it reversed a district court award of crude oil overcharge funds to the U.S. Treasury, holding that "payment to the United States Treasury is not restitution, in the true sense of the word, or in the objectives of the statutes here involved," and that there is a "*duty* to try to ascertain those overcharged and refund them with interest from the restitution funds." In subsequent decisions, the Temporary Emergency Court of Appeals added to its instructions in *Citronelle-Mobile* that there must be a proceeding in which those claiming an entitlement to restitution funds may participate. *Getty Oil Co. v. DOE*, 749 F.2d 734, 739 (TECA 1984), *cert. denied* 105 S. Ct. 1176; *Department of Energy v. Ray L. Hunt, et al.*, 734 F.2d 816, 826 (TECA 1984). As Judge Becker notes in his dissent here, the instant decision by TECA apparently undercuts the authority of all those cases, particularly *Citronelle-Mobile*.

(b) The Fifth Amendment Constitutional principle prohibiting the taking of property for a public

use without compensation. *Blanchette v. Connecticut General Insurance Corp.*, 419 U.S. 102, 122 *et seq.* (1974); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979); *Dames & Moore v. Regan* 453 U.S. 654, 689-690 (1981). Nor, of course, is there any doubt that the right to restitution is a cause of action and, therefore, the kind of property right entitled to due process protection. *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 429 (1982); *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950).

The District Court here, having held that injury was to petitioners and other consumers, has deprived them of their property rights to recover the disgorgement funds by its award of the funds to the poor.

(c) The principle that Courts should refrain from social legislation and restrict themselves to interpreting and applying the statutes as written. *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980). A judicial determination that overcharges to consumers at all economic levels should be returned disproportionately, and indeed essentially exclusively to the poor, is the kind of proposition that the Courts are "without competence to entertain," and ". . . [which] should be addressed to the political branches of the government, the Congress and the Executive, and not to the Courts." 447 U.S., at 317.

One of the dangers about which the Court warned in *Diamond v. Chakrabarty*, is the absence of the "kind of investigation, examination and study that legislative bodies can provide and courts cannot." 447 U.S., at 317. That danger has indeed been embraced by the Court here by virtue of an appropriation for the five programs which is ten times that provided by Congress in the

Warner Amendment and almost equal to the regular annual Congressional appropriation for all five programs. Indeed, the Executive has urged the *Stripper Well Litigation* Court facing the same issue that it should refrain from using the poor persons appropriations route approved by the Temporary Emergency Court of Appeals in *Exxon*, because "the States cannot make effective use of additional monies [beyond those appropriated by Congress and awarded by the *Exxon* and *Sutton* Courts] for these programs at this time." (Appendix H, at B-10). As a result, the issue of whether the designated federal programs should appropriately be funded with additional overcharge funds necessarily becomes a consideration of the Courts in Section 209 proceedings; such makes the Court into a legislature, the very danger against which this Court warned.

The threat of Judicial social legislation is exascerbated by the basis of the affirmance of the District Court's action here by TECA, to wit, the exercise of discretion. If one district court is operating within its discretion to benefit the poor on the basis that they suffered the most from high energy prices, may another court determine that the Northeast States, more dependent upon oil for their energy needs, suffered the most economically and that therefore overcharges throughout the country should be refunded to them? Different dispositions of refunds of essentially similar overcharges, *i.e.*, crude oil, are not only to be tolerated, but indeed apparently to be encouraged. The lack of any standard for testing the exercise of discretion threatens the rule of law which requires both predictability and consistency. Restitution to the injured is not only an appropriate goal by virtue of the mandate of equitable principles and the Statute, it is a necessary standard if the rule of law is to be served.

III. The Court's Decision to Defer to Congress in Determining How to do Equity is Inconsistent With Decisions of this Court With Regard to the Constitutionally Mandated Separation of Powers and Creates a Dangerous Precedent Encouraging Congressional Interference With the Courts.

The District Court acknowledged that it was deferring to the "wisdom of the solution chosen by Congress" in its Warner Amendment disposition of $200 million in Consent Order funds to meet an urgent need in the winter of 1982-3 for poor persons to pay home heating bills.

The principle of such deference to Congress permits Congress to effect specific adjudications under a statute establishing a general standard and leaving to the Courts the applications of that standard. To permit Congress to do so is to permit a "supervening legislative action . . . [which] implies a radical alteration of the role of the federal courts," of a more serious nature than that struck down for that reason, *inter alia*, in *Chadha v. Immigration and Naturalization Service* 634 F.2d 408, 430 (9th Cir. 1980), *aff'd.* 462 U.S. 919 (1983).

The effect of the deference to Congress is to permit Congress to violate the "general rule inherent in the American Constitutional system that unless otherwise expressly provided or incidental to the powers conferred, a legislature cannot exercise either Executive or Judicial power . . ." *Springer v. Phillipine Islands*, 277 U.S. 189, 201-202 (1928); *Buckley v. Valeo*, 424 U.S. 1, 140 (1976); *INS v. Chadha, supra.*

The danger of Congressional adjudication is at least twofold: (i) the lack of "established substantive rules . . . [and] procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or agency adjudicates individual rights." *INA v. Chadha, supra,* 462 U.S. at 966; and (ii) because, as in the Warner Amendment, "no principled basis was articulated for the decision of the Legislature,

the Executive and Judiciary have no basis for determining appropriate future action." *Chadha v. INS*, 634 F.2d, at 432. The second of these dangers was most particularly realized here. The question of whether Congress, which declared its $200 million appropriation in the Warner Amendment, to be a one-time and non-precedential decision to meet a 1982 emergency situation, would desire the same use of ten times the amount in 1986 when the Exxon fund becomes available for distribution is one which cannot be answered by the Courts.

Nor, as noted, can the Courts have any assurance that Congress will recognize an adjudication here based upon its own prior adjudicative determination in the *Warner Amendment*. Emboldened by the knowledge that it can affect adjudications by the Courts, Congress may, as is here possible, take away what the Courts have given by reducing its own appropriations.

IV. The Court's Denial of the Right to Participate to Those Who it Specifically Found Had Been Injured and Deprived of Their Property and Who It Declared to Be Intervenors of Right Denied Them Procedural Due Process and Creates a Dangerous Precedent Permitting Effective Denial of Intervention of Right.

The District Court found in its decision that the Exxon overcharges were "borne by ultimate consumers of petroleum products throughout the entire country." 561 F. Supp., at 853.

These Petitioners are such "ultimate consumers" and as they advised the Court in their Motions to Intervene seek to represent the interest of all motor vehicle surface transportation users of oil products, representing 45% of the use of oil products in the United States.

The District Court granted them intervention, presumably as a matter of right under Fed. R. Civ. P. 24(a), as it had previously, post-decision and pre-judgment,

specifically granted intervention of right to refiners, wholesalers and retailers on the one hand, and to the several State governments on the other.

Petitioners, however, were limited as had been those to whom the Court had previously granted intervention under Rule 24(a), to participation on the appeal of the Court's judgment, and solely as to the remedy issue.

In its post-decision Memorandum with regard to intervention on April 29, 1983, the District Court acknowledged (i) that the remedy which it "fashioned" was one which "DOE never pursued or even suggested," thus providing no pre-decision notice to potential claimants of the Court's remedy selection, and (ii) that it had "stayed earlier motions to intervene by industry applicants pending resolution of the issue of Exxon's liability."[22] Had there been notice that the Court was considering a result which would preclude claims by the consumers the Court found injured, and had the Court not effectively assured would-be intervenors that they would be provided the opportunity to assert their claims to restitution later, Petitioners would have sought intervention at an earlier stage.

The sole justification which the District Court offered for the denial of effective intervention was its determination that for an intervening consumer or group of consumers to succeed would require the tracing of overcharges and a precise calculation of injury, and that such is impossible.

The precedential principle for which the District Court's denial of effective intervention therefore stands

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22. NOJC Appendix D-6, at A-292 *et seq.*; had the Court granted the prayer of the Complaint and awarded the fund to be deposited in the Treasury, a claim process would have been available, even if the Court had not ordered one prior to such deposit. *In re Folding Cartons Antitrust Litigation*, (1984-2) Trade Cases ¶66,189 (7th Cir. 1984).

is that a court may deny intervention even if it finds that the intervenor has been injured in his property right if it believes the intervenor will be unsuccessful in his claim.

Such is tantamount to conditioning the right to a due process hearing on a prior determination that the applicant for the hearing will succeed in his cause. Such is directly in conflict with the repeated decisions of this Court providing for a hearing before the deprivation of a property right. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Matthews v. Eldridge*, 424 U.S. 319 (1976). As this Court recently pointed out:

> "The point is straight forward: The due process clause provides that certain substantive rights —life, liberty, and property — cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. . . . 'While the legislature may elect not to confer a property interest . . ., it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.' "

Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985), quoting from *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974).

Nor, in fact, was the District Court correct either in its holding as an economic fact that tracing is necessary to find the impact of overcharges in crude oil on a class of consumers or, as a legal matter, that precision is required as a condition of obtaining restitution.

As to the former, the OHA Report in the *Stripper Well Exemption Litigation* found, based on expert economic testimony, that the injury at the refiner level can be determined, and adopted a methodology which (i) would enable determination of injury at the reseller and end user levels, and (ii) which would permit allocation at each distribution level to the individual firms at that distribution level. Moreover, since the District Court finds,

whether correctly or not, that all overcharges were passed through to ultimate consumers, all that is necessary for it to develop a restitution plan is an allocation of injuries among groups of consumers.

As to the requirement of precision in determining injury for purposes of developing a plan of restitution, the law, as articulated by this Court and indeed by the Temporary Emergency Court of Appeals, requires only that there be such precision as is obtainable. As Justice Frankfurter explained in his concurring opinion in *Federal Power Commission v. Interstate Natural Gas Co., supra,* 336 U.S., at 586:

> "The task, then, for the Court of Appeals is to reconstruct, *as far as it can possibly be done*, what would have happened had no fund accrued . . . had purchasers from Interstate obtained their gas at a lower rate." (emphasis supplied)

As the Court explained in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1975), the object of restitution is to make the victims whole "so far as possible, and restored to a position where they would have been were it not for" the unlawful violations. *See also, Citronelle-Mobile Gathering Inc. v. Edwards, supra,* 669 F.2d, at 722.

Moreover, the impossibility of developing a restitutionary remedy which the Court assumed, without hearing Petitioners, is belied by the fact that OHA has indeed done so in product case after product case.[23]

Had Petitioners been permitted to participate as to the remedy determination, they would have pointed out to the Court that restitution to motor vehicle surface

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23. *See*, footnote 15, *supra*; the only difference between a crude oil overcharge case and a product case is the tracing of the overcharge to the refiner level, and that is precisely possible by virtue of the Entitlement Program; the allocation among products at the refiner level is a task which OHA has undertaken. See e.g., *In the Matter of Standard Oil Company (Indiana)* 10 DOE ¶85,048.

transportation consumers is relatively simply accomplished, as *e.g.*, by reducing motor vehicle registration fees paid by them, possibly with different levels of reduction in recognition of the different levels of use, *i.e.*, passenger cars, cabs, and trucks. Obviously, such restitution on a per capita basis to current members of the class is not precise restitution, but it is also obviously more accurate than disbursing the funds to current poor people on the basis, not of use, but of economic need, or indeed distribution to the United States Treasury, thus making a fund available in proportion to current tax burdens.

The Temporary Emergency Court of Appeals sought to justify denial of intervention by suggesting that there is no property right in those injured as to oil overcharge funds received by the Federal Government, despite the statutory mandate of restitution, and that accordingly since there is no property right, there is no due process right. The precedential principle for which such a holding stands is that where a court collects, or permits the Executive to collect, overcharges to consumers, it is free to dispose of them as it sees fit. Such a principle not only ignores the statute but equally the repeated rulings of this Court with regard to the duty of a Court collecting overcharges which have been imposed upon injured citizens. *Federal Power Commission v. Interstate Natural Co., et al., supra,* and other cases cited at page 17-18, *supra.*

CONCLUSION

The Petition for Certiorari should be granted as to the issue of remedy, both because of the urgency of avoiding an immediate impending conflict between the Judiciary and the Legislative Branches over the disposition of oil overcharge funds, and because of the dangerous precedential principles for which the decision below stands — (i) that the Judiciary may engage in social legislation, (ii) that the Judiciary may defer to the Legislature in adjudicating individual cases, and (iii) that intervention of right to those with an admitted property interest may be effectively denied on the basis that intervenors will not be successful.

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DATED: September 13, 1985

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APPENDIX

(Appendix A through G submitted in connection with the Petition For Certiorari of National Oil Jobbers' Council and the Jobbers' Group, Independent Gasoline Retailers and Air Transport Association of America are relied upon by Petitioners herein: Appendix H and I follow)

APPENDIX H

Statement of Restitutionary Policy of the Department of Energy

This is the second of the two reports requested from the Department of Energy (DOE) by the court in its Order of May 7, 1985 in *In re: The Department of Energy Stripper Well Exemption Litigation*, MDL No. 378 (D.Kan., May 7, 1985). This report sets forth the DOE's policy of restitution for these crude oil overcharges in view of the findings of fact of the DOE's Office of Hearings and Appeals (OHA) in the first DOE report to the court, dated June 19, 1985.

After the DOE prevailed in the Temporary Emergency Court of Appeals on the validity of the DOE's stripper well regulations, the underlying lawsuit became an enforcement action concerned with the appropriate distribution of the declared overcharges that, for the most part, the plaintiffs had previously been required to deposit in an escrow account. Because this action had begun principally as a declaratory judgment and injunction action challenging the DOE's rulings and regulations during the period of price and allocation controls, the DOE had not had the opportunity to develop an institutional position with respect to the most appropriate means in a decontrolled economy to remedy the harm caused by the overcharges. Accordingly, the DOE sought to have this case remanded to the OHA so that OHA could apply its expertise to attempt to determine the specific incidence of the harm caused by the overcharges and to enable the Department to formulate an informed restitutionary policy in this case.

OHA has now completed its fact-finding regarding the first purchaser and refiner levels of the distribution chain. OHA's unequivocal conclusion is that it is impossible to trace the economic harm of the overcharges to particular firms or individuals. Indeed, none of the participants in the OHA proceeding attempted to trace the

overcharges. Essentially, OHA concluded that direct purchasers (as such) generally did not absorb the overcharges because they were reimbursed by the entitlements programs.[1] Tracing of overcharges is impossible in view of the spreading effect of the entitlements program, the fungibility of refiner costs and the consequent inability of firms and OHA to determine which costs were passed through and which, if any, were retained, and the high proportion of cost passthrough, among other factors.

OHA's finding that it is impossible to trace crude oil cost increases that were equalized by the entitlements program, as were the cost increases in this case, is consistent with the conclusions of the two district courts that have previously determined that the harm resulting from crude oil miscertifications cannot be traced. In *United States* v. *Exxon Corp.*, the court found that "the broad scattering [through the working of the entitlements program and the passthrough regulations] of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each."

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1. The record was found to be inconclusive as to whether some small proportion of the overcharges may have been absorbed by refiner-direct purchasers who were undercompensated in some months by the entitlements program. Further hearings would be required were that factual question determined to be material. Any "undercompensation" would also, of course, have to be reduced by overcompensation in other months and the amount passed through to others, but the OHA has found that that determination of this passthrough is impossible to make on an individual firm basis. Because the entitlements program utilized industry-wide averages and was not intended to equalize each individual refiner's crude oil costs exactly, it is likely that from time-to-time most, if not all, refiners' post-entitlements crude oil costs from miscertified stripper well oil deviated from the average. Therefore, as a matter of policy, especially since the entitlements program was never intended to compensate for any such undercompensation, the DOE recommends against further complicating the refund proceedings by undertaking such a problematical course.

561 F.Supp. 816, 853 (D.D.C. 1983), *appeal docketed*, Nos. DC-91 *et seq.* (TECA July 6, 1983). Similarly, in *United States* v. *Sutton*, the court found, based upon the testimony before it, that tracing the effects of crude oil miscertifications is impossible. *United States* v. *Sutton*, Energy Mgmt. Court Decisions 1981-84 (CCH) ¶26,501, at 29,632 (N.D.Okl. August 17, 1984), *appeal docketed*, Nos. 10-57, 10-58 (TECA October 12, 1984). OHA's exhaustive proceedings, which included 20 days of testimony and resulted in a 12,958 page record, confirmed these conclusions in a proceeding in which all potential claimants were afforded an opportunity to establish a means for tracing.

Since tracing is impossible, OHA extensively examined whether econometric modeling methods, the subject of most of the testimony at the hearing, could be used to estimate with a reasonable degree of reliability the extent to which overcharges were passed through at the various levels of distribution in the industry. Using the method and the data that OHA found most reliable, OHA concluded that it is likely that refiners (as a class) passed through roughly 92 to 98 percent of all stripper well overcharges to their customers (as a class).

The reciprocal is, of course, a conclusion that refiners (as a class) may have absorbed roughly between two and eight percent of the overcharges. But, as the OHA repeatedly emphasized, this conclusion says nothing about the amount of the overcharges any particular refiner may have absorbed. Representing, as it does, nothing more than a rough average derived in turn from analysis of the limited data that has been collected regarding nationwide aggregate supply and demand sensitivity to price changes for crude oil, refining services and petroleum products, some refiners necessarily will have absorbed amounts less than the average while others obviously absorbed more. Nothing in the econometric models purports to answer the question of which

refiners are above and which are below the average. Neither is it feasible, OHA has concluded, to answer that question through an attempt at direct tracing. Therefore, the one certainty is that it is impossible to determine to what extent any individual refiner did not pass through the proportionate share of the overcharges that was distributed to it in the first instance by the automatic operation of the entitlements program.

Since direct restitution based upon individual proof of harm is thus shown to be impossible, some other, indirect means of effectuating restitution must be used. While it might not be unlawful to make indirect restitution to refiners based upon some equitable distribution plan among refiners using a reasonable percentage figure between 2.7 and 8.1 percent, and excluding the share attributable to those producer-refiners who themselves violated the stripper well regulations,[2] the Department, as the agency charged with administering the price control enforcement program, has concluded that this is not the most desirable way to make restitution for the crude oil overcharges at issue in this case. The superficial appeal of putting a small part of the overcharge refunds into the hands of "real" firms in the face of the realization that the best efforts of economists and fact-finders still result in (1) great inexactitude in applying a modeling method establishing a range of best estimates of injury to the refiner class differing by a factor of three, and (2) any matching between the amount a particular refiner receives and the amount of harm suffered being purely coincidental.

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2. Of course, plaintiffs in the *Stripper Well Litigation*, which include most of the largest integrated oil companies and account for more than half of the Nation's refining capacity, would be barred from receiving any portion of the refund by the doctrine of unclean hands. *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717, 723 (TEXA), *cert. denied*, 459 U.S. 877 (1982); *United States* v. *Exxon Corporation*, 561 F.Supp. at 853 n.55.

Additionally, refunds based upon the econometric method developed by OHA would entail considerable administrative costs and very long delays before distribution. It could require further hearings or an individual claims procedure where innumerable direct purchasers could be given an opportunity to substantiate their individual claims. Moreover, hundreds of refiners would at least have to prove up their banks on a monthly basis to be eligible for a refund. Not only the OHA's present decision, but each of the hundreds of individual decisions might then be subjected to judicial challenges. Furthermore, the modeling method would require additional threshold hearings in an attempt to apply econometric methods to establish the most likely degree of overcharge absorption at the wholesaler and retailer levels of distribution for the proportion of petroleum products distributed through them and other downstream distributors.[3]

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3. OHA found that such generic hearings would not be necessary for two classes of purchasers: consumers of petroleum products who purchased directly from refiners and large consumers who purchased products under contracts which provided for the passthrough of changes in entitlements program benefits. The latter class, if they were end-users, absorbed 10 percent of their *pro rata* share of overcharges, and the first group could be presumed to have absorbed roughly 96 percent. However, processing applications by such purchasers would be an unwieldy task since the number of direct purchasers from refiners, which includes (in addition to the airlines, public utilities, and the Federal Government) diverse groups of manufacturers and managers of large commercial buildings, could total tens of thousands of consumers. Moreover, even after administratively processing this large number of claims, there would be no more assurance that the money was actually getting back to the ultimate injured parties under this scheme than under other forms of indirect restitution. For example, while utilities would be subject to mandatory passthrough provisions to current customers, those customers are not necessarily the same as the injured customers who purchased products at the time of the violations. Similarly, the costs incurred by airlines were, at least in part, considered by the Civil Aeronautics Board in approving the airlines' fare

Once this was accomplished, the ensuing individual claims procedures for the thousands of wholesalers and retailers would have to be conducted. Again, distribution most likely would be delayed substantially by numerous challenges in court.

The appropriateness of the burden, cost and delay of these further proceedings is problematic in view of the small percentage of the overcharges that would actually be distributed under such a method. OHA estimated that approximately two to eight percent of the overcharges were absorbed by refiners (more than half of which is attributable to those with unclean hands). OHA did not advance to the point where it could make an econometric examination of the probable degree of passthrough at the petroleum product wholesaler and retailer levels. However, given that OHA's rough estimates were based in part on national product data also applicable to downstream distributions, and that DOE's experience gained in the course of DOE enforcement audits and regulatory actions indicates that during the period when most of the stripper well violations occurred wholesalers and retailers were generally able to pass through their cost increases, it is unreasonable to assume that application of the OHA methodology to wholesalers and retailers as a class would result in a pass-through figure significantly less in magnitude than that for refiners. Thus, the econometric method would most likely distribute only a very small percentage of the overcharges, probably in the range of three to eleven percent (given the unclean hands of so many refiners). It thus appears that almost all overcharges were passed through to ultimate consumers regardless of whether those consumers purchased petroleum products directly from refiners or

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NOTES *(Continued)*

structures during the period prior to deregulation. Now, however, in view of decontrol of the airlines, there is no mechanism to get this money back to those customers who paid the increased fares.

whether they purchased petroleum products through intermediaries. This conclusion, based upon the extensive OHA report, is consistent with the intended workings of the price control program and with the conclusions reached by the district courts in the *Sutton* and *Exxon* cases.

This means that any potential refunds to distributors of petroleum products would be quite small. For example, at the jobber level alone, assuming a four percent level of injury, the average refund to each of the 24,000 wholesalers and wholesaler-retailers (which does not include firms which are solely retailers) could be only about $800.[4] The same is true at the utility level. Even if one takes the best case, where a utility purchased from a refiner under a contract which passed through all entitlements costs, the refund to each customer is quite small. For example, Southern California Edison Company, in its comments before OHA, claimed to be the largest oil consuming utility in the Nation, having purchased about 330 million barrels of fuel oil during the entire control period under contracts providing for the direct flow through of the impact of entitlements from refiners to Edison. Since California Edison serves approximately nine million persons, its customers would receive on the average only about $1.20 even if all 330 million barrels were purchased in 1978-1980 when the primary violations occurred. Of course, even here there

4. The overcharges and interest are approximately one billion dollars. About 49 percent of all gasoline in 1980 was distributed through jobbers. Assuming, for simplicity, the percentage of product distributed through jobbers to be the same for all petroleum products, about $490 million of the overcharges passed through the hands of jobbers. Assuming that jobbers (as a class) absorbed four percent of the overcharges that were passed on to them by their refiner-suppliers, the total amount absorbed by jobbers (as a class) would be about $19 million. Distributing this to all 24 thousand jobbers yields an average refund of about $800. Of course, the members of the jobber population will have changed substantially in the five years since decontrol, presenting yet further difficulties.

would be no tracing. Because the violation occurred years ago, many who were customers then will not be now. Conversely, many who would receive refunds now were not injured because they were not customers then.

This analysis leads DOE to the conclusion that the econometric modeling method of indirect restitution described by the OHA is neither compelled nor desirable. It is too inexact in determining injury to particular classes of claimants and yields no conclusions concerning the injury to individuals within any class. The governmental costs in resources and, more importantly, societal costs in years of continued litigation prior to distribution are unacceptably high. Moreover, the few instances in which it may be possible to make refunds that do not depend upon the econometric method are exceptions to the general rule. These exceptions, representing, as they do, only a small percentage of the overcharges, should not become the focus of DOE's and the court's restitutionary efforts in this case at the expense of the vast population of overcharged consumers.

In view of these conclusions, and because of the enormous amounts at issue in this and similar cases, DOE recommends that the stripper well overcharge monies be maintained in the escrow account to afford the Congress of the United States ample opportunity to select the means for making indirect restitution in crude oil cases like this where the entitlements program spread the effects of the overcharges nationwide and where it is impossible to trace the overcharges and make direct restitution to the specific persons injured by them. Indeed, both the Senate and the House of Representatives have, in the Budget Resolutions that each have passed, provided for the use of these and other petroleum overcharge funds that cannot be traced and refunded to specific overcharged persons (as is the case here) to fund programs aiding all citizens. Specifically, they would be used for federally funded programs, in substitution for other funds which would then be available for general

appropriations or deficit reductions. Such legislation would provide a more systematic and predictable disbursement of the monies than continued independent decisions in DOE's many enforcement cases. The appropriations process was similarly used in 1982 as a vehicle for distributing oil overcharge monies under the Warner Amendment.[5]

Further Continuing Appropriations Act, Pub. L. No. 97-377, Section 155, 96 Stat. 1830, 1919 (1982).

The public policy decision as to the best means of providing indirect restitution to the general public should be made by the Congress on a uniform basis. Moreover, clear congressional guidance would reduce, if not eliminate, time-consuming and costly litigation over appropriate remedies.

If Congress does not enact legislation providing a specific means for distribution of these monies by the end of the next session (*i.e.*, the Fall of 1986) then the most effective means of making indirect restitution to the whole population, over which virtually all of the overcharges were spread, is through the government. This conclusion is consistent with the results reached by the district courts in the *Exxon* and *Sutton* cases and with the congressional will as evidenced in the Warner Amendment. More specifically, the monies should be paid to the general fund of the U.S. Treasury. As the Temporary Emergency Court of Appeals recently explained, payment to the general fund is a lawful and appropriate method of providing indirect restitution since "it will benefit the public." *Payne 22, Inc.* v. *United States*, No. DC-102 (TECA March 29, 1985). By reducing the Federal deficit, it tends to offset the nationwide inflationary impact of the original violation, thus benefiting the economy and citizens generally. This

5. The Administration also has formally submitted to the Congress a draft bill, the Petroleum Overcharge Restitution Act, to resolve the restitution issue that is independent of the adopted Budget Resolutions.

restitutionary nexus was also recognized by this court in its referral order:

A direct refund to the United State Treasury would serve equitable and restitutionary goals. While such a remedy would not aid energy consumers as directly as refund to the states for use in energy programs, it would have certain advantages. It would involve virtually no adminstrative expense and would benefit the public at large by increasing federal revenues.

In re: The Department of Energy Stripper Well Exemption Litigation, 578 F.Supp at 595.

This approach is preferred to further *ad hoc* distribution to the states. If there is no legislation, the states, as a result of the decisions in *Exxon* and *Sutton*, will receive more than two billion dollars for use in certain federally-established energy programs. The Department of Energy, which is responsible for administering and overseeing most of these programs at the federal level, has concluded that the states cannot make effective use of additional monies (beyond those appropriated by Congress and awarded by the *Exxon* and *Sutton* courts) for these programs at this time. The need for the reduction in the federal deficit that would result from payment of these overcharges into the Treasury is well known, as is the benefit to all Americans that would result.

Dated: June 21, 1985.

Danny J. Boggs,

Deputy Secretary.

[FR Doc. 85-15855 Filed 7-1-85; 8:45 am]

Office of Hearings and Appeals

Order Implementing Departmental Policy Regarding Crude Oil Overcharges

Today, the Department of Energy (DOE) filed with the United States District Court for the District of Kansas its policy statement concerning the distribution of the funds in escrow representing overcharges in the *Department of Energy Stripper Well Exemption Litigation*, M.D.L. 378, based on the factual findings made by this office which are simultaneously being submitted to the court. In light of these findings, DOE in its policy statement is recommending that the stripper well overcharges be placed in escrow to afford the Congress of the United States the opportunity to select the means of making indirect restitution. Alternatively, should Congress decline to act on the issue, DOE's policy will be that the monies should be paid to the general fund of the United States Treasury, for the benefit of all Americans.

The decision to place the overcharge funds in escrow pending Congressional action is now DOE policy. In the *Stripper Well Exemption* proceeding, of course, this office was acting solely as a finder of fact under the orders of the Kansas court, and the companion DOE policy statement is a recommendation to that court. However, as to the other overcharge funds representing entitlements-periods crude oil miscertification violations being administered under the authority of 10 CFR Part 205, Subpart V, this office will apply that policy to refund proceedings involving those funds.

We are also announcing today that another previously-enunciated DOE policy now will be implemented by its own terms as a result of the factual findings made by this office. On January 9, 1985, DOE decided that, in view of the determination not to publish

any further entitlements notices, those refiners with adjudicated final "receive orders" arising from the entitlements programs would be funded from overcharge money "[i]f OHA determines that a portion of [this] money corresponds to injury to refiners as a class. . . ." 50 FR 1919, 1921 (January 14, 1985). We have found in the stripper well proceeding that refiners, as a class, absorbed some part of crude oil overcharges.

The economic effects of the entitlements program were felt by all levels of the petroleum distribution chain during price controls. The economic incidence of net reductions in entitlements obligations as a result of exception relief during the program was identical to the incidence of crude oil overcharges during the program. Therefore, DOE has determined that it would be fair to use an appropriate portion of crude oil overcharge funds as a meands to implement relief "to firms with adjudicated hardship." *Id.*

In view of the foregoing, any holder of a finally adjudicated entitlements receive order must, within 30 days of publication of this Order in the **Federal Register**, apply to this office for payment in accordance with that order. Moreover, any person alleging that it is adversely affected by this order must file any objection within 30 days.[1] Any person who subsequently receives a final adjudicated receive order will have 30 days from the date of the order to make an application for payment.

Dated: June 21, 1985.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 85-15854 Filed 7-1-85; 8:45 am]

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1. Because of the litigation concerning the entitlements program, *Texaco Inc.* v. *DOE*, TECA Nos. 3-44 through 49, any payment pursuant to this order will be placed in an interest-bearing escrow account pending the outcome of that litigation.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
v.	:	
ROBERT B. SUTTON	:	
SUTTON INVESTMENTS, INC.;	:	
BPM, LIMITED;	:	No. 82-C-1069-B
SCURRY OIL COMPANY;	:	
SOONER REFINING COMPANY, INC.;	:	
and WILLIAM D. SANDOZ,	:	
as Trustee for Sooner	:	
Refining Company, Inc.	:	

MOTION FOR MODIFICATION OF REMEDY

Plaintiff United States of America moves this Court to modify the distribution formula and the limitations placed on the use of the restitutionary funds by the States. Specifically, the United States requests (1) that the States be permitted to use the monies received for any of the three energy programs identified in the proposed Petroleum Overcharges Restitution Act, H.R. 4972, and (2) that the monies be distributed to the States in proportion to the volumes of refined products consumed in each during the period of price controls.

Respectfully submitted,

s/Thomas C. Newkirk

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
v.	:	
ROBERT B. SUTTON	:	
SUTTON INVESTMENTS, INC.;	:	
BPM, LIMITED;	:	No. 82-C-1069-B
SCURRY OIL COMPANY;	:	
SOONER REFINING COMPANY, INC.;	:	
and WILLIAM D. SANDOZ,	:	
as Trustee for Sooner	:	
Refining Company, Inc.	:	

MEMORANDUM IN SUPPORT OF MOTION FOR MODIFICATION OF REMEDY

One of the most difficult problems facing courts and the Department of Energy (DOE) in energy litigation is what remedy to adopt for large crude oil violations, the consequences of which were spread throughout the economy as a result of the automatic workings of the Entitlements Program, 10 C.F.R. §211.67, and cost pass-through provisions of the Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. §§212.83(c)-(d), 212,93(a), 212.183(c). Both the courts and the agency have previously employed a variety of indirect restitutionary remedies, including various types of payments to the U.S. Government and to state governments, to rectify the injuries suffered by American consumers. After much study of this problem, the DOE has developed what it believes is the most desirable approach to assure a fair and uniform remedy in such situations and has proposed legislation to implement this approach. Petroleum Overcharge Restitution Act, H.R. 4972 (Attachment A). Under the proposal restitution would be made to the states for the benefit of their citizens under any of three specified energy programs. This proposed legislation is similar in some respects to earlier legislation (the

Warner Amendment), which required $200,000,000 in restitutionary funds to be paid to the states for use in specific energy programs, including these same three. Section 155 of the Continuing Appropriations Act for the Fiscal Year 1983, Pub. L. 97-377, 96 Stat. 1919.

The Department's legislative initiative and the Warner Amendment differ in two important ways from the remedy ordered by the Court in this case. First, the Warner Amendment provides for distribution to the states based upon petroleum consumption within the states during the period of controls. This ties the payments to the actual injuries suffered by the citizens of each state. Second, the Department's proposed legislation requires the states to use the funds for three energy-related programs. These programs help to reduce energy demand and costs by weatherizing public buildings, finding cheaper alternative energy sources for schools and hospitals, promoting energy conservation, and by generally tempering increased energy costs for those most in need. In short, these programs generally benefit the energy consumers who were harmed by defendants' misconduct.

The department respectfully recommends that the court consider modifying the remedy in this case to conform to these legislative initiatives. The Department believes that adoption of this suggestion would result in an improved restitutionary vehicle because the approach taken in the proposed Petroleum Overcharge Restitution Act provides a uniform and efficient method for distributing overcharges where, as here, the victims of the overcharges cannot be identified. The proposed legislation provides that the funds be used in three existing energy programs.[1] Using the moneys for these three ear-

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1. Weatherization of public buildings under Part A of the Existing Buildings Act of 1976 (42 U.S.C. §6861 *et seq.*); energy conservation programs for schools and hospitals under Part G of Title III of the Energy Policy and Conservation Act (42 U.S.C. §6371 *et seq.*);

marked programs would have two advantages. First, it would insure consistency with distribution in other cases. Second, this modification would provide the states with the flexibility to allocate the funds among the three programs to meet the particular needs of their citizens, while assuring that the restitutionary moneys be used in energy programs established by Congress.

As one district court explained in making restitution for crude oil overcharges by providing funds to the States for use in federally-established energy programs;

> The purpose of domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs. The . . . energy conservation programs . . . operate across the nation to reduce the same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need.[2]

The United States also requests that this court give consideration to an alternative formula for distributing the moneys to the states. Instead of distributing the funds on the basis of population, previous distributions have been made on the basis of the volume of refined petroleum products consumed in each state.[3] tying dis-

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and financial assistance for low income families under the Low Income Home Energy Assistance Act of 1981 (42 U.S.C. §8621 *et seq.*).

2. *United States v. Exxon Corp.*, 561 F. Supp. 816, 856-57 (D.D.C. 1983), *appeals docketed*, Nos. DC-91 *et al.* (TECA July 6, 1983). In that case, the district court directed that funds be used for the five energy-related programs identified in the Warner Amendment. The three programs which are encompassed in the proposed legislation are the three of the five Warner Amendment programs which the Department believes can make the most effective use of the funds.

3. Attachment B compares the percentage of the restitutionary funds each state would receive based on consumption of refined products by its citizens with the percentage each state would receive based on population.

tribution to consumption in this manner insures that "the moneys be spent in a manner which bears some resemblance to the harm," 121 Cong. Rec. S15115 (Dec. 16, 1982) (Statement by Senator Warner).[4] This is the approach the DOE has used in various special refund proceedings before the agency. *See, e.g., Standard Oil Company (Indiana),* 11 DOE ¶85,185, at 88,301 (1983); *Belridge Oil Co.,* 11 DOE ¶85,197, at 88,331 (1983); *Palo Pinto Oil & Gas Co.;* 11 DOE ¶85,034, at 88,048 (1983).

For the above reasons, the United States suggests that the court consider modification of the remedy to direct that the moneys be distributed to the states for use in the three specified energy programs based on the historical consumption of petroleum products in each state. A copy of a proposed judgment incorporating these modifications is enclosed as Attachment C.

Respectfully submitted,

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4. The Warner Amendment provided that:

> The disbursement by the Secretary of Energy to each State shall be based on the ratio calculated by the Secretary which
>
> (i) the volume of refined petroleum products consumed within that State during the period beginning September 1, 1973, and ending January 28, 1981, bears to
>
> (2) the volume of refined petroleum products consumed within all states during such period.

This approach was also used in *United States v. Exxon, supra.*

ATTACHMENT A

98TH CONGRESS
2D SESSION
H.R. 4972

To provide for distribution to the States of certain amounts resulting from enforcement of the Emergency Petroleum Allocation Act of 1973, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

February 29, 1984

Mr. BROYHILL (for himself and Mr. CORCORAN) (by request) introduced the following bill; which was referred to the Committee on Energy and Commerce

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A BILL

To provide for distribution to the States of certain amounts resulting from enforcement of the Emergency Petroleum Allocation Act of 1973, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United State of America in Congress assembled, That this Act may be cited as the "Petroleum Overcharge Restitution Act".

OVERCHARGE DISTRIBUTION PROCEDURES

SEC. 2. (a) In the manner provided by this Act, the Secretary of Energy shall distribute the following restitutionary amounts—

(1) amounts held in escrow on the date of enactment of this Act, and

(2) amounts received after the date of enactment of this Act,

which are held or received as a result of a settlement, order, or judgment (including a declaratory judgment) involving overcharges resulting from alleged petroleum pricing violations under the Emergency Petroleum Allocation Act of 1973.

(b) A settlement, order, or judgment described in subsection (a) that includes restitutionary amounts shall be referred to the Secretary of Energy who shall conduct a proceeding for the purpose of identifying and making restitution to persons who the Secretary determines sustained economic injury; however, in cases in which an administrative or judicial order or judgment entered before the date of enactment of this Act rests upon a determination that it is impossible or impractical to identify or to make direct restitution to the persons who sustained economic injury, a proceeding shall not be conducted under this subsection, and the restitutionary amounts not yet paid and distributed shall be deposited in the Fund established by section 3(a) of this Act.

(c) In cases in which a court has rendered or renders a judgment in favor of the Government for petroleum pricing violations under the Emergency Allocation Act of 1973, the court shall order that any restitutionary amounts (including interest) not yet paid and distributed be paid to the Department of Energy to be held in escrow pending distribution in accordance with this Act.

(d) While the Department of Energy holds amounts in escrow pending the completion of the proceedings required by this section, the Secretary of Energy may place a portion of those amounts that the Secretary considers appropriate in the Department's minority-owned financial institution depository program.

PETROLEUM OVERCHARGE RESTITUTION FUND

SEC. 3. (a) There is established in the treasury of the United States a fund to be known as the Petroleum Overcharge Restitution Fund (referred to in this Act as the "Fund").

(b) There shall be deposited in the Fund restitutionary amounts described in section 2 of this Act that the Secretary of Energy determines—

(1) exceed amounts needed for refunds to persons who sustained economic injury from overcharges; or

(2) cannot be refunded to persons who sustained economic injury because they cannot reasonably be identified, or because the amount of injury such persons sustained cannot reasonably be determined or is so small that distribution is not reasonably feasible.

(c) Deposits into the Fund shall be made as soon as practicable after completion of the proceeding under section two of this Act, or as otherwise provided by this Act; however, escrow amounts that have been invested shall be deposited in the Fund in a manner that avoids the payment of penalties for premature withdrawal.

(d) When appropriations are made for a program listed in section 4 of this Act, the amount provided shall be derived from the Fund to the extent that amounts are available in the Fund. If amounts in the Fund are not sufficient to cover the appropriation made for such a program, the remaining amounts shall be derived from the general fund of the Treasury and shall be returned to the general fund to the extent that amounts become available in the Fund.

AUTHORIZATION OF APPROPRIATIONS

SEC. 4. For each of the fiscal years 1985 through 1989 there is authorized to be appropriated for carrying out

(i) Part A of the Energy Conservation in Existing Buildings Act of 1976 (42 U.S.C. 6861-6873),

(ii) Part G of title III of the Energy Policy and Conservation Act (42 U.S.C. 6371-6371j), and

(iii) the Low Income Home Energy Assistance Act of 1981 (42 U.S.C. 8621-8629)

amounts that do not exceed the amount appropriated in fiscal year 1984 by Public Law 98-146 for the programs in clauses (i) and (ii) and by Public Law 98-139 for the program in clause (iii). Amounts appropriated pursuant to this section may be made without fiscal year limitation.